97-84149-6

Wambaugh, Eugene

Exemption from Panama tolls

[n.p.]

[1913]

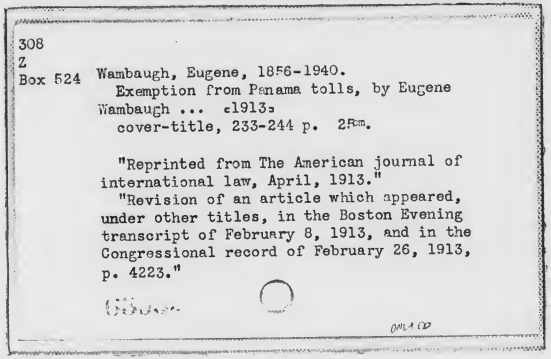
97-84149-6

MASTER NEGATIVE #

COLUMBIA UNIVERSITY LIBRARIES
PRESERVATION DIVISION

BIBLIOGRAPHIC MICROFORM TARGET

ORIGINAL MATERIAL AS FILMED - EXISTING BIBLIOGRAPHIC RECORD



308
Z
Box 524 Wambaugh, Eugene, 1856-1940.
Exemption from Panama tolls, by Eugene Wambaugh ... c1913.
cover-title, 233-244 p. 25cm.

"Reprinted from The American journal of international law, April, 1913."
"Revision of an article which appeared, under other titles, in the Boston Evening transcript of February 8, 1913, and in the Congressional record of February 26, 1913, p. 4223."

TECHNICAL MICROFORM DATA

FILM SIZE: 35mm REDUCTION RATIO: 12:1 IMAGE PLACEMENT: IA (IIA) IB IIB

DATE FILMED: 7-31-97 INITIALS: PB

TRACKING # : 25870

FILMED BY PRESERVATION RESOURCES, BETHLEHEM, PA.

EXEMPTION FROM PANAMA TOLLS

BY

EUGENE WAMBAUGH

REPRINTED FROM
THE AMERICAN JOURNAL OF INTERNATIONAL LAW
APRIL, 1913

EXEMPTION FROM PANAMA TOLLS

A DISCUSSION BASED UPON THE LAW OF PUBLIC CALLINGS [1]

"A trust for mankind" is what President Cleveland in a message termed such an enterprise as the Panama Canal. The question just now is whether such a trust is administered properly by giving to vessels engaged in the coasting trade of the United States a total exemption from tolls. It should be noticed that the question is not whether exemption may be given to war ships and other ships of the government, but whether it may be given to the ships of private owners. It should be noticed also that the question is not whether there may be a subsidy, — in other words, not whether the tolls of such vessels may properly be paid out of the national treasury — in which case the burden would be borne by all residents of the United States through the internal revenue, the tariff, and other taxes, and the benefit would be enjoyed initially by the treasury of the Panama Canal and eventually by all persons whom the canal may serve. No, the question is whether, in the words of the Panama Canal Act of 1912, "no tolls shall be levied upon vessels engaged in the coastwise trade of the United States," — with the almost inevitable result that the tolls exacted from other vessels will thus be made heavier than they otherwise would be.

This question is to some extent dependent upon treaty; but as a basis for understanding the whole matter it is essential to remember that a treaty is made in the light of existent national and international law, practice, and discussion. Hence the treaty itself may well be laid aside until after the presentation of other points.

THE LAW OF ENGLAND AND AMERICA AS TO PUBLIC CALLINGS

Let us begin at the beginning.

When a person builds a private railway on his own land he has a

[1] This is a revision of an article which appeared, under other titles, in the *Boston Evening Transcript* of February 8, 1913, and in the *Congressional Record* of February 26, 1913, p. 4223.

right to exclude all persons from using it and to exact any compensation he may see fit from any person to whom he may from time to time grant the occasional use of this private railway. Yet as soon as he holds out his railway as ready to serve the public he finds that the law now places upon him a new series of duties. This may be a surprise to the owner, for, naturally enough, he thinks that as long as he does not so use his property as to injure other persons he may use it as he pleases, continuing to exclude some persons from the advantages of the property and granting to other persons those advantages on any terms he may choose, whether those terms are identical or are discriminatory, and whether they give him an enormous compensation or not. His natural belief as to this matter is wholly in conflict with American and English law. From the time when he holds out his railway as a means of serving the public he is held by the courts to have entered upon a public calling, and he is thereafter compelled by the courts to perform some peculiar duties, of which it is enough for the present purpose to specify three — the duty of serving all comers, the duty of rendering identical services on identical terms, and the duty of charging only a reasonable rate.

It is not necessary to give in full the reasons upon which these rules of law are founded; but those to whom rules come as a surprise may very properly wish that the reasoning be not wholly omitted. Briefly, then, one of the reasons is found in the importance to the public of such service as this, and another is found in that discouragement of building other railways which arises from the building of this one. In other words, the public needs the service of a railway, and danger of competition from this one tends to prevent the building of another; and hence, unless this one can be compelled to give its chosen service fairly, the public will really suffer an injury.

The burdens, it should be repeated, are not cast upon this owner without his consent. If he had chosen, he might have carried on his railway wholly for himself, unless and until it should be taken from him by right of eminent domain; but by announcing his railway as open for the public he has assumed a new and peculiar position to which the law attaches special duties, and among others those enumerated duties of serving all, of serving without discrimination, and of serving at reasonable rates.

This is the important doctrine upon which, in the United States,

rests a great part of the power of those State and national commissions which deal with railways and other public callings. It is indeed one of the most important of the doctrines by which public welfare is secured without departure into socialism.

The peculiar duties attaching to those entering upon a public calling belong not only to individuals but also to incorporated companies — and to incorporated companies more clearly than to individuals because the incorporated company owes its very existence to that public which incorporated it. Besides, the incorporated company engaged in a public calling sometimes receives and uses that right of taking private property which is termed eminent domain; and, as the right of eminent domain cannot be exercised save by a government or under a grant given by a government, and whenever exercised must be used for public purposes, the mere exercise of the power of eminent domain carries with it the assumption of the duties of public service as to the property thus acquired.

Again, if a railway for public use is built by a city or other municipal corporation, this municipal corporation incurs the same duties — and still more clearly, for the municipal corporation is created by the State as an instrumentality for nothing but the public service.

Further, and still more clearly, as each of the United States is created by the people for public service exclusively, a State's railway, unless, indeed, used exclusively by the State government itself or by county or municipal governments, must be subject, as a matter of principle, to precisely similar duties. It is true that a State government, as distinguished from its officers, cannot be sued without the State's consent, and that hence a State may enjoy practical immunity from suit; but the absence of a remedy cannot blind anyone to the fact that a State owes duties; and the duties which the State imposes in behalf of the public against individuals and incorporated companies and municipalities cannot honorably be said by a State to be non-existent as duties of the State simply because the State may have supplied no machinery whereby the State itself can be subjected to compulsion.

Finally, in case the United States should build a railway, other than for the use of troops or for some similar end resembling that to which a private individual for his own private purposes might devote a railway

of his own, the United States, as matter of principle, must come under the same duties attaching to a public calling — the duty of serving all, of serving equally, and of serving on reasonable terms. It is true that the United States cannot without consent be sued in any court, whether the court be State, national, or international, and that hence there is no means known to ordinary law of enforcing such an obligation as this, and that thus in a sense the duty is merely moral; but some merely moral duties are perceptible by the law, and surely a duty precisely like one which the national government enforces in its own courts against others cannot, in case it rests upon the national government itself, be termed in any abusive or disrespectful or minimizing sense a merely moral duty. Perhaps analytical jurists may say properly enough that there is no duty unless there is a whip behind it; but a nation cannot say this with self-respect.

It follows, then, that if the United States enters upon any business belonging to the class called public callings, there rest upon the United States, as matter of principle, the same duties which belong to others who enter upon such callings — the duties of serving all, of discriminating against none, and of serving at a reasonable rate. It should be understood that such duties derogate in no way from the ordinary powers of government. No, as to the places where the United States may carry on these undertakings the United States must continue to have, to the same extent as before, full power of keeping the peace and all the other powers for which governments are organized; but by entering upon a career essentially non-governmental it will assume as to non-governmental matters, in this instance as to some sort of business belonging to the class of public callings, the duties belonging to all other conductors of such callings.

THE CANAL AS A "PUBLIC CALLING"

What callings are public? That is a difficult question to answer; but it is enough for the present purpose to point out that by both reason and authority the character of a public calling attaches to a canal. Indeed, a canal is a somewhat clearer instance than a railway; for canals, having preceded railways, were earlier examples of public callings; and, besides, a canal, more obviously than a railway, renders unlikely the building of a competitor in the same neighborhood and for the purpose of meeting the same need.

Thus, independently of any treaty, one reaches the conclusion that by the rules of law observed in the United States, and in England also, the United States, whenever owning a canal of a commercial sort, that is to say, a canal not reserved for the war ships and other public vessels used by the government, is, as matter of principle, under the duty of permitting the canal to be used by all comers, and at rates which do not discriminate, and at rates which are reasonable.

And what are reasonable rates? On the one side it is clear that the total amount of income is not unreasonable if it simply pays cost of operation and of depreciation, a fair interest on the investment, and a sum equivalent to insurance against disaster. On the other side, it is clear that a total income greatly in excess of this would be unreasonable. What is more difficult is to determine the reasonableness not of the total income, but of specific rates. On this last point it is, however, easy to see that any rate which causes the person paying it to bear more than his fair share is unreasonable. This is in fact another mode of reaching the undoubted result that rates must not be discriminatory, for the burdening of some users tends to give an excessive return for the whole enterprise, unless some other users be unduly exempted; and, conversely, the exempting of some users, at least in cases where an enterprise is dependent wholly upon receipts, carries with it the burdening of others. Yet it is unnecessary to go through this mode of reaching the result; for the duty of any pursuer of a public calling to abstain from discrimination is a duty which rests firmly enough on its own separate foundation of justice.

Abstention from discrimination, it will be understood, does not mean that a small vessel must pay as much as a large one. Nor does it mean that certain classes may not receive special treatment, provided such special treatment is not arbitrary and does not place an unreasonable burden upon others. It is conceivable that the general principles of the law of public callings would permit granting to coastwise vessels some reduction in tolls; for a reduction might result in an increase in the income of the canal and thus might benefit all users, as in the case of rail-

way commuters. Reduction, however, is vastly different from exemption; for increasing the number of users by charging each user a toll of zero will give no increase in income.

THE PROFESSION IN THE TREATY

Thus far there has been no mention of the question whether the United States can be said to have made, as to the Panama Canal, an announcement of public service. Every one knows that there is such a profession in the Hay-Pauncefote Treaty of 1901. The words of the treaty will be given hereafter; but thus far it has seemed enough to show, without reference to international treaties, presidential messages, and the like, that if the United States, as owner of the Panama Canal, does make an announcement of public service, there rests upon the United States, as matter of principle, an obligation, as close to a legal obligation as can rest upon a government, to serve all comers, to serve them alike, and to serve them fairly.

Independently of treaty, it must be recognized as a sound general principle that, when a nation enters upon a business which is non-governmental, it assumes towards its own citizens and towards the citizens of other nations duties similar to those owed by private individuals engaged in similar business, and more specifically that this is true as to those businesses which are deemed public callings. It is not, however, in the present instance necessary to insist that such duties bind a nation in the absence of a treaty. It is enough to point out that certain peculiar duties attach to individuals engaged in certain occupations and then to insist that both the declarations of public officials and the words of treaties must be read in the light of the peculiar duties recognized and enforced against individuals by the ordinary law of the countries in interest.

It may well be true that an interoceanic canal is an enterprise so peculiar that, at least when the canal is the property of a nation, it would be desirable, from some points of view, that the ordinary rules as to public callings should not be applied to it; but nevertheless those rules are part of the atmosphere which surrounds whatever is done or agreed by men acquainted with the English and American system of

law, and consequently in writing or in reading any English and American treaty those rules normally will be taken to be present unless they are expressly said to be absent.

THE DOCUMENTS PRECEDING THE HAY-PAUNCEFOTE TREATY

It is now time to turn to the documents which led up to the Hay-Pauncefote Treaty of 1901. Do those documents show that the United States deemed it inappropriate for an interoceanic canal to be subject to the ordinary rules applicable to public callings? The very words of the essential documents must be quoted; and this will now be done.

In 1826, Henry Clay, Secretary of State, instructed the delegates to the Panama Congress that if a canal should ever be constructed through the Isthmus, "the benefits of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation, or reasonable tolls."

Again, in 1835, there was a resolution passed by the Senate "that the President of the United States be respectfully requested to consider the expediency of opening negotiations with the governments of other nations * * * for the purpose of * * * securing forever * * * the free and equal right of navigating such canal to all such nations, on the payment of such reasonable tolls as may be established, to compensate the capitalists who may engage in such undertaking and complete the work."

In 1839 the House of Representatives adopted a similar resolution requesting the President "to consider the expediency of opening or continuing negotiations * * * for the purpose of ascertaining the practicability of effecting a communication between the Atlantic and Pacific oceans by the construction of a ship canal across the Isthmus, and of securing forever, by suitable treaty stipulations, the free and equal right of navigating such canal to all nations."

In the Treaty of 1846, ratified in 1848, New Granada, now Colombia, "guarantees to the Government of the United States * * * that no other tolls or charges shall be levied or collected upon citizens of the United States * * * over any road or canal that may be made by the Government of New Granada, or by the authority of the same, than

is, under like circumstances, levied upon and collected from the Granadian citizens"; and the purpose of this treaty is explained in President Polk's message to the Senate, in 1847, thus: "Neither the Government of Granada nor that of the United States has any narrow or exclusive views. The ultimate object * * * is to secure to all nations the free and equal right of passage over the Isthmus."

In 1850 the Clayton-Bulwer Treaty between Great Britain and the United States, having in mind chiefly a canal through Nicaragua, agreed that neither of the two countries will hold, "directly or indirectly, for the citizens or subjects of the one, any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other," and that each of them "shall enter into treaty stipulations with such of the Central American States as they may deem advisable for the purpose of more effectually carrying out the great design of this convention, namely, that of constructing and maintaining the said canal as a ship communication between the two oceans, for the benefit of mankind, on equal terms to all," and that the treaty shall extend in principle to any canal or railway across the Isthmus, and that it is understood "that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

In 1858 Lewis Cass, Secretary of State, in writing to the United States Minister to Central America, said: "The progress of events has rendered the interoceanic routes across the narrow portions of Central America vastly important to the commercial world. * * * While the just rights of sovereignty of the states occupying this region should always be respected, we shall expect that these rights will be exercised in a spirit befitting the occasion and the wants and circumstances which have arisen. Sovereignty has its duties as well as its rights, and none of these local governments * * * would be permitted, in a spirit of

Eastern isolation, to close these gates of intercourse on the great highways of the world, and justify the act by the pretension that these avenues of trade and travel belong to them, and that they choose to shut them, or what is almost equivalent, to encumber them with such unjust regulations as would prevent their general use."

In the same year, Mr. Cass, writing to the British Minister to the United States, said, as to the Clayton-Bulwer Treaty: "The principle was that the interoceanic routes should * * * be neutral and free to all nations alike."

In 1881, James G. Blaine, Secretary of State, wrote to the United States Minister to Great Britain, that, while certain modifications were desired in the Clayton-Bulwer Treaty, the United States "frankly agrees and will by public proclamation declare at the proper time, in conjunction with the republic on whose soil the canal may be located, that the same rights and privileges, the same tolls and obligations for the use of the canal, shall apply with absolute impartiality to the merchant marine of every nation."

Thus far the documents unanimously indicate recognition of those duties which pertain to all public callings. Only one document of a contrary tenor has been discovered. That is the projected convention of 1884 between Nicaragua and the United States. That convention provided for equal tolls for all nations, excepting coastwise vessels of the two parties to the convention. Yet this convention was withdrawn by President Cleveland from consideration by the Senate; and thus the record remains unbroken down to the Hay-Pauncefote treaties.

Finally, the Suez Canal Convention of 1888, to which the United States was not a party, provided that "The Suez Maritime Canal shall always be free and open * * * to every vessel * * * without distinction of flag," and that "The High Contracting Parties, by application of the principle of equality as regards the free use of the Canal, a principle which forms the basis of the present treaty, agree that none of them shall endeavor to obtain with respect to the canal territorial or commercial advantages or privileges in any international arrangements which may be concluded."

The Suez Canal Convention may well serve as an introduction to the Hay-Pauncefote treaties; but it is hardly necessary for that purpose, for

the American and English law as to public callings and the documents of the United States prior to the Hay-Pauncefote treaties, as has been shown, throw adequate and harmonious light upon the probable intent underlying those treaties. It now remains to inquire whether the treaties use language which overthrows the doctrines of public calling which any one acquainted with law and with diplomatic history would expect to find recognized in them.

THE HAY-PAUNCEFOTE TREATY OF 1901

So much for English and American law and the chain of documents prior to the Hay-Pauncefote treaties, to which treaties discussion frequently is restricted.

The terms of the unratified Hay-Pauncefote Treaty of 1900 and of the ratified Hay-Pauncefote Treaty of 1901, now in force, are practically identical in all passages even remotely pertinent to the question of tolls.

The Hay-Pauncefote Treaty of 1901 expressly superseded the Clayton-Bulwer Treaty and said:

> The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the Convention of Constantinople, signed the 28th of October, 1888, for the free navigation of the Suez Canal; that is to say: 1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable. * * * No change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

In the light of English and American law as to public callings, the words of this Hay-Pauncefote Treaty — "open to vessels of all nations" — "on terms of entire equality" — "no discrimination" — "charges just and equitable" — sound not unfamiliar. In truth those passages of the treaty are much like extracts from the opinions of English and American courts.

SUMMARY

As has been pointed out, the United States, when it enters upon a world-wide public calling, such as the Hay-Pauncefote Treaty describes, might well be held, even without treaty stipulations, to have assumed the duties which are created by the law prevalent in the United States as to such a calling. As the courts have established for private individuals engaged in a public calling the rule of equality and justice, a government — even though it be not under the duty of being more just than the private individual — will have to give reasons of extraordinary strength for holding that when it itself conducts a public calling the rule may be inequality and injustice.

Again, whatever might be the duties of the United States in the absence of a treaty, the system of law used by both England and the United States furnishes the natural and necessary introduction and commentary for any treaty between these countries. This system has in it for public callings a doctrine requiring equality and reasonableness.

Further, as to an Isthmian canal, this doctrine has been assumed and recognized and asserted by the United States from the beginning.

Finally, this doctrine is the very essence of the words in the Hay-Pauncefote Treaty. If the treaty were silent as to the matter, the general law of England and the United States, and also the uniform recognition of the doctrine of equality in the past by the President, the Secretary of State, the Senate, and the House of Representatives, would make it difficult to insist that mere silence in the treaty would authorize the opposite policy of discrimination, but the treaty deals with the matter expressly and deals with it in harmony with what was to have been expected from the previous course of American and English law and of negotiation.

For the reasons given, it seems practically impossible not to come to the conclusion that the United States must give the services of the Panama Canal to all merchant vessels, and without discrimination, and on reasonable terms.

Hence, as the analogies of the law prevalent in the United States and England require uniformity, and as the current of official declaration from the beginning requires uniformity, and as the treaty in force re-

quires uniformity, the exempting — as distinguished from the subsidizing — of vessels engaged in the coasting trade appears to be impossible — impossible because in this matter the United States, though free, like every sovereign, from the compulsion of ordinary courts, has the honor to be in a place of responsibility, managing "a trust for mankind."

EUGENE WAMBAUGH.

END OF
TITLE